In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 949

MATTHEW RUBINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial lasting nine weeks, petitioner was convicted on four counts of willful attempt to evade his individual income tax for the years 1958 through 1961 and was sentenced to consecutive prison terms of 2½ years on each count and fined $10,000 on each count (App. 353a).[1]

The sole question raised in the petition is whether petitioner was deprived of a fair trial by reason of

[1] The designation "App." refers to the Joint Appendix filed in the court below. The designation "R." refers to the transcript of the trial proceedings, and is preceded by the volume number and followed by the page number.

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certain newspaper articles which appeared in the Detroit press about a week before the conclusion of the trial and which were shown to have been read by some of the jurors. Both articles related to Mr. Louisell, the defense attorney, and to another criminal case in which he represented a defendant. Throughout the instant trial the judge had repeatedly cautioned the jury against reading any newspaper articles or listening to any radio or television broadcasts relating to the case. The articles in question, however, did not fall within the proscription, since they related to another case. The article in the Detroit Free Press (Pet. App. D) made no mention of appellant, although it did recount some unflattering remarks made by another judge about defense counsel's pre-trial activity in the other case. The eleventh paragraph of the article in the Detroit News (Pet. App. D), upon which petitioner bases his primary complaint (Pet. 4, 7, 9, 12), refers to petitioner as a reputed member of the Mafia.

The trial judge interrogated each of the fourteen jurors, out of the presence of the others, about their exposure to the articles. He was "satisfied that the jurors who read the article or saw the headline referring to Mr. Louisell, were not influenced, and, in the court's opinion, are able to render a fair and impartial verdict in this case * * *." (34A R. 36). The court of appeals affirmed.

The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by

jurors of news articles relating to the trial. *Marshall* v. *United States,* 360 U.S. 310, 312; *Holt* v. *United States,* 218 U.S. 245, 251. "Generalizations beyond that statement are not profitable, because each case must turn on its special facts." *Marshall, supra,* 360 U.S. at 312. In the *Marshall* case, relied upon heavily by petitioner, the articles in question contained highly prejudicial material, which was read by seven of the twelve jurors and which, among other things, made it clear that the defendant had twice previously been convicted of felonies. It was held there that Marshall was deprived of a fair trial, but as the court below concluded in the case at bar (Pet. App. 19), "In our opinion the contents of these two newspaper articles do not measure up to the degree of prejudice which resulted in reversal in *Marshall.*"

Where, as here, there is no reason to believe that the newspaper stories came through or from the prosecution (Pet. App. 21), the burden of showing prejudicial harm rests upon the defendant. *Marshall* v. *United States,* 355 F. 2d 999, 1007 (C.A. 9), certiorari denied, 385 U.S. 815. Petitioner has not met that burden. Surely the article in the Detroit Free Press (Pet. App. D), which does not even mention petitioner, is not sufficiently prejudicial to warrant a new trial. Cf. *United States* v. *Cimini,* 427 F. 2d 129, 130 (C.A. 6), certiorari denied, November 9, 1970, Nos. 520 and 521, this Term. As for the article in the Detroit News, the court below found that "the record establishes affirmatively that only one juror read the paragraph in which Rubino was mentioned

as to which prejudice is claimed" (Pet. App. 17). If the defense thought that this article was prejudicial to them it should have asked, as the Court of Appeals noted, that this juror be replaced by one of the two alternate jurors, neither of whom had read either one of the articles (App. 327a–328a). The defense did not do so, and the two alternates were excused from the jury six days later when the jury began its deliberations (38 R. 158–159). Having failed to avail himself of the remedy afforded by Rule 24(c) of the Federal Rules of Criminal Procedure,[2] petitioner cannot now complain that he was deprived of a fair trial. Cf. Pet. App. 18, 21.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General,
JOHNNIE M. WALTERS,
Assistant Attorney General,
JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

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[2] That rule provides for alternate jurors to replace jurors "who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties."

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